Supreme Court, U.S.
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No. 98-1493

In the

Supreme Court of the United States

OCTOBER TERM, 1998

TED HERRING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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May 25, 1999

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court — in conflict with the United States Court of Appeals for the Second, Third, Fourth, and District of Columbia Circuits — erred in excluding evidence of trial performance in determining whether a death penalty defendant's attorney "actively represented conflicting interests" within the meaning of this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

2. Whether the Florida Supreme Court correctly held — in direct conflict with this Court's decisions in *Clemons v. Mississippi*, 494 U.S. 738 (1990) and *Sochor v. Florida*, 504 U.S. 527 (1992) — that it could vacate an aggravating circumstance and impose the death penalty without either reweighing the evidence or conducting a harmless error analysis.

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Ted Herring ("Herring") respectfully requests that this Court summarily reverse the September 24, 1998 and May 2, 1991 decisions of the Florida Supreme Court in this case, upholding the denial of Herring's Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure.

In the alternative, Herring respectfully petitions this Court for a writ of *certiorari* to review the September 24, 1998 and May 2, 1991 decisions of the Florida Supreme Court in this case, upholding the denial of Herring's Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure.

JURISDICTION

Petitioner relies upon the statement of Jurisdiction set forth in his initial brief, and, for the reasons set forth below, rejects the State's contention that his petition for writ of *certiorari* to review the May 2, 1991 decision of the Florida Supreme Court is untimely.

STATEMENT OF THE CASE

Petitioner relies upon the Statement of the Case set forth in his petition for writ of *certiorari*.

I. THE FLORIDA SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS OF NUMEROUS OTHER COURTS AND DEMONSTRATES UNCERTAINTY IN THE LOWER COURTS IN THE APPLICATION OF *CUYLER v. SULLIVAN*

In his first claim, Herring argues that the Florida Supreme Court misconstrued this Court's decision in *Cuyler* and ignored the decisions of numerous other courts which have held that counsel's performance at trial is highly relevant in performing a *Cuyler* analysis of actual conflict. *Petition* at 13. The State agrees that a defendant is entitled to relief under *Cuyler* when his counsel (i) had an actual conflict of interest, and (ii) the conflict adversely affected his representation of the defendant. *Id.* The State further concedes that the Florida Supreme Court expressly refused to address, as required by the second prong of the *Cuyler* standard, any aspect of Pearl's performance at trial. *Id.*

Having made these concessions, the State is left only to claim, without elaboration, that the Florida Supreme Court's decision is consistent with *Cuyler* and the four decisions cited in the petition. It does not, however, meet the petitioner's argument that each of these courts recognized that the two parts of the *Cuyler* test "are often intertwined, making the factual analyses of them overlap." *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991). Hence no proper analysis under *Cuyler* can confine itself to one prong of the test, or wilfully ignore counsel's trial performance. Such ignorance is especially inexplicable where, as here, trial counsel's performance offers the clearest possible demonstration that he was laboring under a conflict between his allegiance to law enforcement and his representation of his client. *Petition* at 6-7.

II. IN UPHOLDING HERRING'S SENTENCE DESPITE THE ELIMINATION OF THE HEIGHTENED PRE-MEDITATION AGGRAVATING CIRCUMSTANCE, THE FLORIDA SUPREME COURT VIOLATED THE EIGHTH AND FOUR-TEENTH AMENDMENTS

A. The Decision Of The Florida Supreme Court Is Indistinguishable From This Court's Decision In *Sochor*

The decision of the Florida Supreme Court in *Herring* is indistinguishable from the Florida Supreme Court decision overturned by this Court in *Sochor v. Florida*, 504 U.S. 527 (1992). As in *Sochor*, Eighth Amendment error occurred when the trial judge weighed the "heightened premeditation" aggravating circumstance in the absence of proof, beyond a reasonable doubt, of "calculation" which consists of a "careful plan or prearranged design to kill." *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987); cf. *Sochor*, 504 U.S. at 540; *Petition* at 19. As in *Sochor*, because

> the Supreme Court of Florida did not explain or even "declare a belief that" this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained" . . . . the error cannot be taken as cured by the State Supreme Court's consideration of the case.

Sochor, 504 U.S. at 539 (citation omitted). It therefore must follow, as in *Sochor*, that Herring's sentence "cannot stand on the existing record of appellate review." *Id.* at 540. The State wisely — if gracelessly — does not attempt to distinguish *Sochor*. Nor can the State now remedy the Florida Supreme Court's error by describing its decision as a "finding of harmless error," *Respondent's Brief* at 18, when the court itself failed to identify what (if any) type of analysis it purportedly performed. This Court rejected in *Sochor* the State's nearly

identical effort to overcome in its argument on *certiorari* the Florida Supreme Court's "fail[ure] so much as to mention 'harmless error.'" *Sochor*, 504 U.S. at 539-40.

B. Herring Properly Presented His Federal Claims To The Florida State Courts

In complete disregard of the record, the State argues that Herring cannot seek this Court's review of his claim under *Clemons v. Mississippi*, 494 U.S. 738 (1990) and *Sochor v. Florida*, 504 U.S. 527 (1992) because "that claim was never raised before the State Courts." *Respondent's Brief* at 17. In fact, the record clearly indicates that Herring challenged the violation of his Eighth and Fourteenth Amendment rights both in his 3.850 Motion to Vacate Sentence, *Appendix* at 1 – 3, and in his appeal to the Florida Supreme Court of the trial court's denial of the 3.850 motion. *Appendix* at 5. During the appeal, the State argued in the alternative that the erroneous application of that aggravating factor was harmless. *Appendix* at 9. In his reply brief, Herring responded to the State's argument — anticipating the issue presently before this Court — by contending that the erroneous application of the heightened premeditation aggravating factor could not be considered harmless error beyond a reasonable doubt, citing *Clemons* for the proposition that "failure to remand to a sentencing jury violates the Constitution 'if the decision is made arbitrarily.'" *Appendix* at 15. Thus, the State's argument is demonstrably false.

C. Final Judgment Was Entered On January 14, 1999 And This Court Has Jurisdiction Over All Federal Questions Decided In All Earlier Stages Of The Litigation

This Court has jurisdiction to review "all of the substantial federal questions determined in the earlier stages of the litigation" by the Florida Supreme Court. *Reece v. Georgia*, 350 U.S. 85, 87 (1955). There was nothing "bizarre" about the facts in *Reece*, as the State now asserts without explanation, *Respondent's Brief* at 18, and this Court did not limit its holding in *Reece* to those facts. Moreover, *certiorari* could not have been obtained earlier, because the Florida Supreme Court's June 12, 1991 denial of rehearing was not a final judgment as of that date within the meaning of 28 U.S.C. § 1257. In general, this Court's final judgment rule

> preclude[s] reviewability here where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). There can be little doubt that the State would have invoked this rule had Herring sought *certiorari* review in 1991.

However, Herring's case would not have qualified for an exception to the final judgment rule in 1991. As the State's own authority, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), makes clear, "[i]n most, if not all" of the cases in which an exception to the final judgment rule was found, "additional [state court] proceedings would not require the decision of other federal questions that might also require review by the Court at a later date . . ." *Cox*, 420 U.S. at 477. Indeed, as the Court observed in *Flynt v. Ohio*, 451 U.S. 619 (1981), *certiorari* is inappropriate where "it appears that [on remand] other federal issues will be involved in the trial court . . .," and "there is no identifiable federal policy that will suffer if the state criminal

proceeding goes forward." *Id.* at 621-22. Because the judgment of the Florida Supreme Court did not become final until, after an eight-year delay, that court decided all aspects of petitioner's original appeal, the State's contentions present no obstacle to this Court's exercise of jurisdiction over both of Herring's constitutional claims.

CONCLUSION AND REQUEST FOR SUMMARY REVERSAL

Because the State has failed to address the merits of Herring's claims, and because the State's procedural contentions are unavailing, petitioner requests summary reversal of the judgment below. *See, e.g., Espinosa v. Florida*, 505 U.S. 1079 (1992). In the alternative, and for the foregoing reasons, petitioner Ted Herring's petition for a writ of certiorari should be granted.

Dated: May 25, 1999

Respectfully submitted,

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APPENDIX

STATE OF FLORIDA

v.

TED HERRING

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.

CASE NO.: 81-1957-C

MOTION TO VACATE SENTENCE

1. The Decision In *Rogers v. State* Is A Constitutional Change In Law

29. First, *Rogers* was a "constitutional change of law," as required by *Witt*. The United States Supreme Court has made clear that, as a matter of federal consitutional law, a state court's construction of its aggravating factors must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983). Just recently, in *Maynard v. Cartwright*, ___ U.S. ___, 108 S. Ct. 1853 (1988), the United States Supreme Court reemphasized that a death sentence cannot stand where a state court fails to apply a limiting construction of a broadly worded aggravating factor in order to channel and narrow those cases that will be subject to the death penalty. On its face, the heightened premeditation aggravating circumstance is so broad as to encompass, potentially, *any* premeditated murder. However, the United States Supreme Court has made clear that there must be a "narrowing principle" that will focus and limit the breadth of a factor that would otherwise be unconstitutionally vague and overboard. *Cartwright*, 108 S. Ct. at 1859; *see also Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759 (1980).

30. For this fundamental reason, the decision in *Rogers* is one of vital constitutional importance, because it ensures the legality — under the Eighth and Fourteenth Amendments to the United States Constitution — of the heightened premeditation aggravating circumstance. Without a limiting construction of this sort, the factor would be subject to constitutional attack under *Cartwright* and *Godfrey*. This was no mere "evolutionary refinement" in the law, *Witt*, 387 So. 2d at 929; it was a critical, constitutionally compelled narrowing of a potentially overinclusive and therefore potentially unlawful aggravating factor. *See Herring I*, 446 So. 2d at 1058 (Ehrlich, J., concurring in part, dissenting in part) (the majority holding "bring[s] into question the constitutionality of [the heightened premeditation] aggravating factor and, perhaps, the constitutionality, *as applied*, of Florida's death penalty statute") (emphasis in original).

II. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation Of The Eighth and Fourteenth Amendments

38. While the Florida capital sentencing scheme has been upheld on constitutional grounds as written, *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960 (1976), the Eighth and Fourteenth Amendments require that it be applied consistently and fairly. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976); *see also Spaziano v. Florida*, 468 U.S. 447, 459-60, 104 S. Ct. 3154, 3162 (1984); *Eddings v. Oklahoma*, 455 U.S. 104, 110-11, 102 S. Ct. 869, 874 (1982) (emphasizing the "twin objectives" of "measured, consistent application and fairness to the accused").

39. Thus, even a carefully designed capital sentencing statute violates the Eighth and Fourteenth Amendments if it is applied so that the cases in which the death penalty is imposed are indistinguishable from the cases in which it is not. *Spaziano*, 468 U.S. at 460, 104 S. Ct. at 3162 (citing *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733). Accordingly, the

Supreme Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Cartwright*, 108 S. Ct. at 1858 (citations omitted).

40. Where, as here, a capital sentencing statute requires the application of a defined aggravating circumstance to impose a death sentence, "[p]art of a State's responsibility . . . is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion.'" *Godfrey*, 446 U.S. at 428, 100 S. Ct. at 1764 (quoting *Gregg*, 428 U.S. at 196 n. 47, 96 S. Ct. at 2936). A particular sentence of death violates the Eighth Amendment where a state court "fail[s] to apply its previously recognized limiting construction of [an] aggravating circumstance" which forms the basis of that death sentence. *Cartwright*, 108 S. Ct. at 1859 (citing *Godfrey*, 446 U.S. at 429, 100 S. Ct. at 1765).

41. Herring's death sentence plainly violates these constitutional requirements — a fact which the Supreme Court of Florida has implicitly acknowledged in *Rogers*, 511 So. 2d at 533. In *Rogers*, the Florida Supreme Court recognized that it had erred in deciding Herring's direct appeal, and overruled that decision. *Id. Rogers* makes clear that Herring's death sentence was improper at the time it was imposed.

42. The ninth aggravating circumstance enumerated in Florida's capital sentencing statute is that:

> [t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla. Stat. Ann. § 921.141(5)(i) (West Supp. 1984).

No. 75,209

In the

Supreme Court of Florida

TED HERRING,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM DENIAL OF MOTION TO VACATE JUDGMENT AND SENTENCE BY THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR VOLUSIA COUNTY

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ARGUMENT

I.

THE ERRONEOUS APPLICATION OF THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE TO THE FACTS OF THIS CASE REQUIRES VACATION OF HERRING'S DEATH SENTENCE

A. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation Of The Eighth And Fourteenth Amendments

Herring I has now been explicitly overruled by *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 98 L. Ed.2d 681, 108 S. Ct. 733 (1988) ("Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in *Herring [I]*, to the extent it dealt with this question."); *see Herring III*, 528 So. 2d at 1178 ("Since our decision in *Herring [I]*, this Court, in *Rogers v. State*, adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in *Herring [I]*.") (citations omitted). *Rogers* and *Herring III* confirm that Herring is now entitled to relief on the merits of this claim.

2. The Application Of The Heightened Premeditation Aggravating Circumstance Is An Error of *Constitutional Dimension*

While the Florida capital sentencing scheme has been upheld on constitutional grounds as written, *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed.2d 913, 96 S. Ct. 2960 (1976), the Eighth and Fourteenth Amendments require that it be applied consistently and fairly. *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed.2d 859, 96 S. Ct. 2909 (1976); *see also Spaziano v. Florida*, 468 U.S. 447, 459-60, 82 L. Ed.2d 340, 104 S. Ct. 3154 (1984); *Eddings v. Oklahoma*, 455 U.S. 104, 110-11, 71 L. Ed.2d 1, 102 S. Ct. 869 (1982).

Where, as here, a capital sentencing statute requires the application of a defined aggravating circumstance to impose a death sentence, "[p]art of a State's responsibility . . . is to define the crimes for which death may be the sentence in a way that obviates 'standardless (sentencing) discretion.'" *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L. Ed.2d 398, 100 S. Ct. 1759 (1980) (quoting *Gregg*, 428 U.S. at 196 n.47, 96 S. Ct. at 2936). A particular sentence of death violates the Eighth Amendment where a state court "fail[s] to apply its previously recognized limiting construction of [an] aggravating circumstance" which forms the basis of that death sentence. *Maynard v. Cartwright*, 486 U.S. 356,100 L. Ed.2d 372, 108 S. Ct. 1853 (1988) (citing *Godfrey*, 446 U.S. at 429, 100 S. Ct. at 1765).

In *Cartwright*, 486 U.S. at 356, the Court unanimously affirmed the *vacatur* of a death sentence based on the erroneous application of a statutory aggravating circumstance. At issue was Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. Relying on *Godfrey*, the Court concluded that the Oklahoma Court of Criminal Appeals had "failed to apply its previously recognized limiting construction of the aggravating circumstance," and that, as a result, "there was 'no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" *Cartwright*, 486 U.S. at 363, 108 S. Ct. at 1859 (quoting *Godfrey*, 446 U.S. at 433, 100 S. Ct. at 1767). The Court concluded that the application of the aggravating circumstance to the facts of *Cartwright* "without some narrowing principle to apply to those facts" violated the Eighth Amendment. *Id.*

In *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002, 78 L. Ed.2d 697, 104 S. Ct. 508 (1983), the Eleventh Circuit vacated a death sentence on the basis of, among other things, the erroneous application of Florida's "heinous, atrocious, and cruel" aggravating circumstance, as well as the state's "risk of death to many persons" aggravating factor. Relying on *Godfrey*, the court held that "[a]pplication of [these] aggravating factor[s] to the facts

of this case is not only inconsistent with the Florida Supreme Court's construction of the provision[s]; it also reflects an absence of control or guidance of the sentencing judge's discretion." 685 F2d at 1265-66. The court concluded that the erroneous application of the statutory aggravating circumstances "suggests no 'inherent restraint on the arbitrary and capricious infliction of the death sentence,'" and therefore, violated the Eighth Amendment. *Id.* at 1264-65 (quoting *Godfrey*, 446 U.S. at 428, 100 S. Ct. at 1764).

As the Eleventh Circuit later explained in *Hargrave v. Wainwright*, 804 F.2d 1182, 1194 (11th Cir.), *rehearing en banc granted and vacated on other grounds*, 809 F.2d 1486 (11th Cir. 1986):

> In sum, the state reviewing courts in both *Proffitt* and *Godfrey* failed to give any explanation or set forth any facts upon which the courts justified their findings of the particular aggravating circumstance under review. *Moreover, upon an independent examination of the record, neither this circuit in Proffitt nor the Supreme Court in Godfrey could distinguish the facts in the case before it from the many in which the state courts had not found the particular aggravating circumstances to apply.*

Id. (emphasis supplied). This rationale applies with particular force to the present case.

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Herring next claims he is entitled to a new sentencing hearing because the trial court considered an improper aggravating factor. This argument is without merit since no aggravating factor was improperly considered, and even if it were, the sentence of death would remain. *See Clemons v. Mississippi*, 4 F.L.W. Fed. S224 Case No. 88-6873 (March 28, 1990). In *Herring v. Dugger*, 528 So.2d 1176, 1178-79 (Fla. 1988), Herring challenged the effectiveness of appellate counsel for failing to prevail on the cold and calculated aggravating circumstance issue. This court rejected that claim, finding not only that counsel's performance was not deficient, but also that there was no showing that the alleged deficiency would have changed the outcome. The state submits that implicit in this court's ruling was the ruling that even if the CCP factor were stricken the death penalty is appropriate where there are three weighty aggravating factors and one arguable statutory mitigating factor, age; and nonstatutory mitigation that Herring had a difficult childhood. Even if an aggravating factor is stricken, the death penalty should be imposed. *See Rogers v. State*, 511 so.2d 526 (Fla. 1987); *Rivera v. State*, 545 So.2d 864 (Fla. 1989); *Lusk v. State*, 446 So.2d 1038 (Fla. 1984); *Jackson v. State*, 530 So.2d 269 (Fla. 1988). This is particularly true where age is not necessarily a mitigating factor, *Lamb v. State*, 532 So.2d 1051 (Fla. 1988), and the nonstatutory mitigating factors do not mitigate the crime. *See Rogers*, *supra* at 534. The trial court found that the mitigation was not sufficient to block imposition of the death penalty where a defendant with a prior violent felony conviction murders an innocent clerk during a robbery so the clerk will not testify against him. Error, if any, was harmless beyond a reasonable doubt and would not change the trial court's opinion. *Rogers*, *supra* at 535; *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

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ARGUMENT

I.

HERRING I HAS BEEN "EXPRESSLY OVERRULED," THUS REQUIRING, UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, THE VACATION OF HERRING'S DEATH SENTENCE

A. The Heightened Premeditation Aggravating Circumstance Was Applied In Violation Of The Eighth And Fourteenth Amendments

The State devotes much of its Answer Brief to the remarkable proposition that *Herring I* has not been overruled, AB at 10-15, notwithstanding this Court's clear holdings to the contrary. In *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 98 L. Ed. 2d 681, 108 S. Ct. 733 (1988), this Court held that "[s]ince we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in *Herring [I]*, to the extent it dealt with this question." Even if there were some doubt as to the meaning of this holding, the Court unambiguously restated the result of *Rogers* in *Herring III*: "Since our decision in *Herring [I]*, this Court, in *Rogers v. State*, adopted Justice Ehrlich's view and *expressly overruled* the application of this aggravating circumstance under the factual situation set forth in *Herring [I]*." *Herring v. Dugger*, 528 So. 2d 1176, 1178 (Fla. 1988) (citations omitted) (emphasis supplied). It cannot seriously be disputed that *Herring I* has now been overruled.

Indeed, the State *did not* dispute that fact in litigating Herring's Federal Petition for a Writ of *Habeas Corpus*. To the contrary, the State, in its response to Herring's Federal Petition, conceded that

> by virtue of the decision in *Rogers*, one of the aggravating factors upon which the trial court based its decision to [impose] the death penalty would seem to have been eliminated in this case.

R.O.A. at 41.

Under these circumstances, the State's further contention that the heightened premeditation aggravating circumstance was applied properly to the facts of this case is demonstrably false. All of the surrounding circumstances indicated that the shooting was an accident. At trial, the State offered no evidence to refute Herring's statement that he shot the clerk "by mistake." In his confession, Herring admitted to four other armed robberies in the same time period; he never fired his gun or harmed anyone during any of these incidents. Indeed, prior to his arrest, he had never been convicted, or even accused, of any violent crime. In light of *Rogers* and *Herring III*, it is clear that the heightened premeditation aggravating circumstance could not be applied in any future case involving facts identical to those in *Herring I*; put another way, if the State presented precisely the same evidence at Herring's resentencing hearing, the trial court could not impose a sentence of death on the basis of this aggravating circumstance.

For these reasons, the State's reliance upon *Eutzy v. State*, 541 So. 2d 1143 (Fla. 1989), is misplaced. In *Eutzy*, this Court held that its decision in *Rogers* was not a fundamental change in the law which "should be given retroactive effect," but was a mere "evolutionary refinement" in the law of the heightened premeditation aggravating circumstance. 541 So. 2d at 1147; *see also Harich v. State*, 542 So. 2d 980, 982 (Fla. 1989). Here, Herring does not seek the retroactive benefit of *Rogers*. In essence, Herring claims the precise opposite: in holding that *Rogers* was not a "jurisprudential upheaval" requiring retroactive application, this Court recognized that the law of the heightened premeditation aggravating circumstance had not changed; *Rogers* was merely an "evolutionary refinement" in a body of law that had been applied consistently — with the

exception of this case — since well before the decision in *Herring I*. *See* IB at 13-18 (citing cases). Thus, if anything, *Eutzy* supports Herring's position.

As Herring demonstrated in his Initial Brief, United States Supreme Court decisions such as *Maynard v. Cartwright*, 486 U.S. 356, 100 L. Ed.2d 372, 108 S. Ct. 1853 (1988), and *Godfrey v. Georgia*, 446 U.S. 420, 429, 64 L.Ed. 2d 398, 100 S. Ct. 1759 (1980), are controlling here.* In overruling *Herring I*, this Court recognized that, like the Oklahoma courts in *Cartwright*, it "failed to apply its previously recognized limiting construction of [the heightened premeditation] aggravating circumstance." *Cartwright*, 486 U.S. at 363, 108 S. Ct. at 1859. However, the mere acknowledgment of error, without eliminating the heightened premeditation aggravating circumstance which formed a critical basis for Herring's death sentence, does not satisfy well-established constitutional standards. Under *Cartwright* and *Godfrey*, Herring's sentence violates the Eighth Amendment because this Court applied a statutory aggravating circumstance to the facts of this case "without some narrowing principle to apply to those facts," and thus, "there [is] 'no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" *Id.* (citations omitted).

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* In this regard, the State's reliance upon *Brown v. State*, 15 F.L.W. S165 (Fla. Mar. 22, 1990), is unavailing. In *Brown*, this Court concluded that the heightened premeditation aggravating circumstance was applied correctly and in accordance with *Rogers*, and rejected defendant's contention that that aggravating circumstance was unconstitutionally vague under *Cartwright*. Thus, *Brown* did not address the legality of a death sentence where, as here, the state courts failed to apply their "previously recognized limiting construction" of the heightened premeditation aggravating circumstance, nor may *Brown* reasonably be read as holding that the *Cartwright/Godfrey* principle is applicable only to this state's "heinous, atrocious, and cruel" aggravating factor.

B. Herring Is Entitled To A New Sentencing Hearing Because The Erroneous Application Of The Heightened Premeditation Aggravating Circumstance Was Not Harmless Beyond A Reasonable Doubt

The State argues alternatively that the erroneous application of that aggravating factor was harmless. In essence, the State contends that this Court's refusal to reach the question of retroactivity in *Herring III* should be read as an implicit finding that the error committed in *Herring I* was harmless. No fair reading of *Herring III* warrants this conclusion.

The State concedes, as it must, that this Court refused to reach the issue of the retroactive application of *Rogers*, or the merits of Herring's claim regarding the erroneous application of the heightened premeditation aggravating circumstance, in *Herring III*. AB at 14. Indeed, the State specifically made the point in opposing Herring's Federal Petition, arguing that Herring's *Rogers* claim had "yet to be presented to any state court." R.O.A. at 41. Thus, in *Herring III*, this Court did not address its acknowledgment in *Rogers* of its error in *Herring I*, and certainly did reach the question of whether that error was harmless, implicitly or otherwise.

Nor can the error at issue be considered harmless beyond a reasonable doubt. At trial, the jury recommended the death sentence by a vote of 8 to 4. Elimination of the heightened premeditation aggravating circumstance, which formed a critical basis for both the State's case at sentencing and the trial court's ultimate sentencing determination, almost certainly would have affected, if not altered, the outcome of Herring's sentencing hearing. The presence of two substantial mitigating factors — Herring's age at the time of the offense and his difficult life as a child and young adult — reinforces the conclusion. *Cf. Holsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988) (citing *Herring I*).

Herring is entitled to a new sentencing hearing as a matter of law. See *Elledge v. State*, 346 So. 2d 998, 1003 (Fla. 1977) ("Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial."); *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943, 40 L. Ed.2d 295, 94 S. Ct. 1950 (1974). Indeed, because "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances," *Elledge*, 346 So. 2d at 1003, this Court has consistently ordered new sentencing hearings in similar cases. *See, e.g., Peavy v. State*, 442 So. 2d 200, 203 (Fla. 1983) (new sentencing hearing required where elimination of heightened premeditation aggravating circumstance left "three aggravating factors to be weighed against two mitigating factors"); *Dudley v. State*, 545 So. 2d 857, 860 (Fla. 1989) (new sentencing hearing ordered where elimination of heightened premeditation aggravating circumstance left three aggravating factors and one mitigating factor). The result here should be no different. *Cf. Clemons v. Mississippi*, 58 U.S.L.W. 4395, 4399-4400 & n.5 (Mar. 28, 1990) (failure to remand to a sentencing jury violates the Constitution "if the decision is made arbitrarily").

C. Herring's Claim Relating To The Erroneous Application Of The Heightened Premeditation Aggravating Circumstance Is Neither Procedurally Barred Nor An Abuse Of Process

The State's final contention, that "[s]ince the validity of the [heightened premeditation aggravating circumstance] was raised in prior post-conviction motions, the reassertion of the claim is an abuse of process" and is procedurally barred, AB at 15, is also incorrect. In essence, the State argues that since Herring has diligently asserted this claim, only to be denied relief on the basis of error this Court has now acknowledged, Herring should be procedurally barred from seeking the relief to which he indisputably is entitled. Herring respectfully submits that procedural rules and defenses are inapplicable to the unique circumstances of this case: Herring cannot be faulted — let alone penalized — for failing to have convinced the courts of this state of an error this Court subsequently has acknowledged.

Herring raised the issue of the improper application of the heightened premeditation aggravating circumstance in his initial 3.850 Motion. At that time, the State argued, and this Court agreed, that the issue was procedurally barred because it was raised on direct appeal. *Herring II*, 501 So. 2d at 1280. The State's argument now, apparently, is that Herring is still barred even though on direct appeal the issue was decided wrongly. Such an argument is not only absurd; it makes a mockery of the principles of due process and fairness that must underlie any rational criminal justice system. *Cf. Sanders v. United States*, 373 U.S. 1, 8, 10 L. Ed. 2d 148, 83 S. Ct. 1068, 1073 (1963) ("[c]onventional notions of finality of litigation have no place where life and liberty is at stake and infringement of constitutional rights is alleged").

Moreover, as Herring pointed out in his Initial Brief, the State's invocation of procedural bar flies directly in the face of the State's position in opposing Herring's Federal Petition; namely, that in light of *Rogers*, "the issue of whether the trial court would have, or could have, still imposed that same sentence has yet to be presented to any state court." R.O.A. at 41. Thus, even if procedural defenses could properly be invoked in this case — which they cannot — the State has waived such defenses. *See Smith v.Zant*, 887 F.2d 1407, 1438 (11th Cir. 1989) (*en banc*) (Kravitch, J., concurring in part and dissenting in part) ("The state selected its defenses and its arguments . . . it must accept the ramifications of those choices. Waiver of claims is not a principle that works only to the detriment of petitioners.").